

STATE OF MICHIGAN
COURT OF APPEALS

BONITA L. HILL, Individually and as Personal
Representative for the Estate of NORMAN C.
HILL,

UNPUBLISHED
December 12, 2013

Plaintiff/Counter-
Defendant/Appellee/Cross
Appellant,

v

No. 312018
Saginaw Circuit Court
LC No. 09-005306-CZ

RANDALL HILL and NORMAN C. HILL
IRREVOCABLE TRUST,

Defendants/Counter-Defendants-
Appellees,

and

RICHARD HILL,

Defendant/Counter-
Plaintiff/Appellant/Cross-Appellee.

Before: MURPHY, C.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Defendant Richard Hill¹ appeals as of right the trial court's order granting plaintiff summary disposition under MCR 2.116(C)(9) (opposing party has failed to state valid defense) and (C)(10) (no genuine issue of material fact). For the reasons set forth in this opinion, we reverse and remand to the trial court for further proceedings consistent with this opinion.

Plaintiff married Norman C. Hill in 1973.² Norman Hill is the father of defendant and defendant Randall Hill. In 1973, Norman's grandmother, Della Hill, was part owner of a

¹ Randall Hill is no longer involved in the litigation which is the basis of this appeal. Accordingly, all references in the singular to "defendant" are to Richard Hill.

² Norman Hill died in 2008.

business named Jim's Tavern (later renamed Hill's Tavern). On January 28, 1974, the Saginaw Circuit Court ordered the administrator of Della Hill's estate to convey all of the estate's interest in Jim's Tavern to Norman Hill. In the same order, the court required Leland Hill to convey to Norman Hill any interest which he had acquired or may have acquired from the estate.

Around 1975-1976, Norman made plans to purchase the portion of the business and real property not already conveyed to him under the January 28, 1974 order. Norman entered into an agreement with defendant under which defendant would contribute money for the purchase price. Documents were prepared reflecting the establishment of a partnership between defendant and Norman. The documents described personal property, real property, and a liquor license. In 1985, Norman Hill and plaintiff incorporated "Hill's Tavern, Inc." Sometime in 1991, the Hill's Tavern liquor license was transferred to Hill's Tavern, Inc.

In 2003, defendant and his wife, Bethany Hill, were divorced. In July 2004, Norman executed several documents that became the subject of litigation in probate court. One document was described as the Norman C. Hill Irrevocable Trust, and another was a deed purporting to convey title in the subject real property to Randall Hill. Both of these documents were held invalid by the probate court—a decision this Court affirmed on appeal. *In re Hill Estate*, unpublished opinion per curiam of the Court of Appeals, issued May 26, 2011 (Docket No. 294925).

On April 8, 2009, defendant and Randall Hill brought their unsuccessful suit in the Saginaw County Probate Court to enforce the Randall C. Hill Irrevocable Trust and the quitclaim deed purporting to convey title to the subject real property to Randall Hill. Defendant also petitioned the probate court for an accounting of all lease payments received by plaintiff from Hill's Tavern Inc., and a judgment awarding defendant lease payments to which he was entitled as an owner of the real property. The probate court held the deed invalid because it was never delivered, and held the trust invalid because it was not funded. The probate court dismissed defendant's claim for accounting and lease payments under the doctrine of laches.

Plaintiff then sued to quiet title to the subject real property. The case was stayed pending resolution of defendant's appeal from the probate court decision. After this Court issued its opinion in Docket No. 294925, the litigation resumed. Thereafter the circuit court granted plaintiff's motion for summary disposition and motion to strike defendant's counterclaim on the grounds that the probate court's decision barred defendant's claim under the doctrine of res judicata. This appeal ensued.

On appeal, defendant argues that he was one of two partners in "Hill's," a Michigan registered co-partnership. The partnership acquired title to the subject real property by two deeds in 1983 and 1993. The partnership dissolved in 2008 when defendant's only partner, Norman Hill, died. When the partnership dissolved, the property owned by the partnership passed to defendant as the surviving partner. Defendant was then required to "wind up" the partnership, which included paying the value of the deceased partner's interest to his estate.

Defendant further argues that even if this Court finds that the partnership dissolved at an earlier date, defendant is in the same position with respect to the real property. He traces his

chain of title to the deeds conveying the real property to himself and Norman Hill as partners and there have been no subsequent transfers divesting him of that title.

Conversely, plaintiff argues though there were documents indicating a partnership between Richard Hill and Norman Hill, the parties intended the documents to reflect a loan from Richard to Norman. Plaintiff contends that even if a partnership existed, it was dissolved in 1985 when all of the assets (except for the real property) of Hill's Tavern were transferred to Hill's Tavern, Inc. Therefore plaintiff states, because plaintiff and Norman Hill were in actual, exclusive, continuous, open and notorious possession of the real property for more than 15 years after 1985, any claim defendant had to the property is barred under the doctrine of adverse possession. Plaintiff also asserts that defendant's claim to the property is barred under the doctrine of res judicata because the issue has been decided by the probate court. Lastly, plaintiff argues that defendant is also barred from litigating his claim under the doctrine of judicial estoppel because he took the position in a prior lawsuit (a divorce) that he did not own any interest in the real property.

The issue of whether defendant has an interest in the real property was preserved for appeal because it was raised in and decided by the trial court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). This Court reviews a trial court's decision to grant or deny summary disposition de novo. *BC Tile & Marble Co, Inc v Multi Bldg Co, Inc*, 288 Mich App 576, 590; 794 NW2d 76 (2010). "[A] motion under MCR 2.116(C)(9) tests the legal sufficiency of a defense by the pleadings alone." *USA Cash # 1, Inc v City of Saginaw*, 285 Mich App 262, 265; 776 NW2d 346, (2009). "A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817, (1999). The evidence is evaluated in the light most favorable to the non-moving party. *Id.* "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law." *Id.*

Defendant claims his interest under two deeds dated April 29, 1983 and May 5, 1993 (the 1983 deed conveying the north portion of the land, the 1993 deed conveying the south). The deeds purport to grant title to "Norman Hill and Richard Hill, doing business as 'Hill's', a Michigan registered co-partnership." Michigan partnerships are governed by the Uniform Partnership Act (UPA), MCL 449.1 *et seq.* Under the UPA, a partnership is defined as "an association of 2 or more persons . . . to carry on as co-owners a business for profit." MCL 449.6. Under MCL 449.8, property acquired "by purchase or otherwise, on account of the partnership is partnership property." Under MCL 449.25, "a partner is a co-owner with his partners of specific partnership property holding as a tenant in partnership." MCL 449.25(d) states, "On the death of a partner his right in specific partnership property vests in the surviving partner or partners. . . . Such surviving partner . . . has no right to possess the partnership property for any but a partnership purpose." When a partnership dissolves, the partners have the right to "wind up" the partnership. MCL 449.37.

Here, this Court has previously ruled that there was a partnership and that this partnership dissolved in 1985 when the tavern business was incorporated.³ *In re Hill Estate* (Docket No. 294925), p 6. Furthermore, the record reveals that this partnership held title to the subject real property by way of the deeds conveying title to the partners in the name of the partnership. MCL 449.8.

The partnership was dissolved in 1985, but UPA makes clear that dissolution does not lead to termination until the partnership is wound up. MCL 449.30. No facts in the record indicate the partnership was ever wound up. Therefore, it appears that the partnership had not been terminated as of 2008 when Norman Hill died. Under MCL 449.25(d), defendant, as surviving partner, took title to the partnership property for the partnership. Partnership property is not held by the partners as tenants in common. *Kay Inv Co, LLC v Brody Realty No 1, LLC*, 273 Mich App 432, 440-441; 731 NW2d 777 (2006). MCL 449.25(e) also makes clear that “a partner’s right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.” Accordingly, Norman Hill’s interest in the partnership and its property did not pass into his estate when he died. The surviving partner, defendant, took title under MCL 449.25(d).

Defendant correctly states that his responsibility would then be to wind up the partnership and pay the value of Norman Hill’s interest in the partnership property to Norman Hill’s estate. *Taylor v Lint*, 338 Mich 673, 677-678; 62 NW2d 453 (1954).

Plaintiff argues that any claim defendant has to the subject real property is barred by the doctrine of res judicata because the issue was or could have been litigated in the prior probate court case. In *Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004), the Michigan Supreme Court stated to following concerning the doctrine of res judicata:

The doctrine of res judicata is employed to prevent multiple suits litigating the same cause of action. The doctrine bars a second, subsequent action when (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. . . .

Clearly the first two elements are satisfied—the probate court’s decision was on the merits, and the parties are identical. The question then becomes whether the issues raised in this case were actually litigated or could have been litigated in the prior probate court proceeding.

To determine whether the claim could have been resolved in a prior proceeding, Michigan uses what is called the “same transaction test.” *Id.* at 124. In *Adair*, the Court stated,

³ The date of dissolution was crucial to the prior panel’s determination that defendant did not have the right to a partnership accounting because the right to accounting accrues at the date of dissolution. *In re Hill Estate* (Docket No. 294925), pp 5-6, citing MCL 449.43. The suit in the probate court in 2009 was, therefore, time barred under the applicable statute of limitations. *Id.* at p 6, citing MCL 600.5807(8).

“Whether a factual grouping constitutes a transaction for purposes of res judicata is to be determined pragmatically, by considering whether the facts are related in time, space, origin or motivation, [and] whether they form a convenient trial unit.” *Id.* at 125 (internal quotation marks and citation omitted; alteration by *Adair*).

Plaintiff argues that defendant’s counterclaim to quiet title is sufficiently related in space, time, origin, and motivation to the claims decided by the probate court to constitute a single transaction for the purposes of res judicata. Defendant contends that the probate court proceedings had nothing to do with his claim to title of the real property and only decided his interest with respect to the tavern business.

Quiet title is an action in equity, MCL 600.2932(5), and equity jurisdiction is in the circuit courts, *Van Etten v Manufacturers Nat Bank of Detroit*, 119 Mich App 277, 286; 326 NW2d 479 (1982). Michigan’s Estates and Protected Individuals Code (EPIC) MCL 700.1101, *et seq.* EPIC grants the probate court “concurrent legal and equitable jurisdiction” in the limited circumstances described in MCL 700.1303, i.e., to determine a property right or interest “*in regard to an estate of a decedent, protected individual, ward, or trust.*” MCL 700.1303 (emphasis added); see also *In re Rudell Estate*, 286 Mich App 391, 393; 780 NW2d 884, 886 (2009). Defendant claims his title to the property not under his late father’s estate or trust, but under the 1983 and 1993 deeds conveying title to him and Norman Hill doing business as Hill’s. Therefore, because defendant’s quiet title action could not have been raised in the prior suit in probate court, so his claim is not precluded by res judicata.

Plaintiff also argues that the probate court impliedly determined that defendant had no rights in the property when it ruled that he was not entitled to lease payments. Plaintiff argues that defendant “had essentially sued his father, over [his] real property interests, and lost.” The probate court, however, did not rule against defendant because he held no interest in the property, but rather because he had waited too long and was barred by the equitable doctrine of laches from recovering lease payments. *In re Hill Estate* (Docket No. 294925).

On cross-appeal, plaintiff argues that the trial court erred in holding that judicial estoppel did not bar defendant’s counterclaim. Plaintiff argues that because defendant did not disclose his interest in the subject real property to the court during his 2003 divorce proceeding, he should not now be able to assert his claim of title.

“Because the purpose of judicial estoppel is to protect the integrity of the judicial process, it is an equitable doctrine invoked by a court at its discretion.” *Opland v Kiesgan*, 234 Mich App 352, 365; 594 NW2d 505 (1999) (citation and internal quotation marks omitted). This Court, therefore, reviews this issue for abuse of discretion. The trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

“Under [the doctrine of judicial estoppel], a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an inconsistent position in a subsequent proceeding.” *Paschke v Retool Indus*, 445 Mich 502, 510; 519 NW2d 441 (1994). “Judicial estoppel is an extraordinary remedy to be invoked when a party’s inconsistent behavior will otherwise result in a miscarriage of justice. It is not meant to be a

technical defense for litigants seeking to derail potentially meritorious claims.” *Opland*, 234 Mich App at 364 (internal quotation marks and citations omitted). Judicial estoppel should only apply “to situations where the risk of inconsistent results with its impact on judicial integrity is certain.” *Id.* at 365. The doctrine “‘is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories.’” *Id.* at 364, quoting *Levinson v United States*, 969 F2d 260, 264 (CA 7, 1992).

It is not clear on this record that defendant “unequivocally asserted” that he had no claim to the subject property in the divorce litigation. Certainly defendant failed to disclose his interest. However, we cannot find from the record presented in this case, evidence that defendant was deliberately attempting to manipulate the courts. Consequently, the trial court did not abuse its discretion in holding that judicial estoppel does not bar defendant’s counterclaim. Furthermore, defendant correctly states that Michigan’s statute of frauds requires a transfer of an interest in real property to be in writing. MCL 566.106. Even if defendant had clearly and unequivocally sworn under oath in a prior proceeding that he did not hold title to the subject real property, such a declaration would have had no legal effect on his title.

Plaintiff argues that even if *res judicata* and judicial estoppel do not apply to defendant’s claim, we should affirm the trial court because any claim defendant had to the property was terminated by adverse possession. “A claim for adverse possession is equitable in nature . . . [a]nd decisions regarding equitable claims, defenses, doctrines, and issues are reviewed *de novo*.” *Beach v Lima Twp*, 283 Mich App 504, 508; 770 NW2d 386 (2009).

“A claim of adverse possession requires clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years.” *Wengel v Wengel*, 270 Mich App 86, 92; 714 NW2d 371, (2006), quoting *Kipka v Fountain*, 198 Mich App 435, 438, 499 NW2d 363 (1993). In addition, the possession must be hostile and under a claim of right. *Id.* “The term ‘hostile’ as employed in the law of adverse possession is a term of art and does not imply ill will; rather, hostile use is that which is inconsistent with the right of the owner, without permission asked or given, and which would entitle the owner to a cause of action against the intruder.” *Id.* at 92-93 (internal quotation marks and citations omitted).

A special rule applies to adverse possession claims between co-tenants:

“[A]s between tenants in common, a claim of adverse possession by one should not be of doubtful character, but clear and unambiguous. The reason of this is that the possession itself is rightful, and does not imply adverse possession as would that of a stranger, so that the presumption of possession in recognition of the rights of co-tenants must be overcome by acts and declarations clearly inconsistent therewith brought home to the co-tenants.” [*Id.* at 96, quoting *Campau v Campau*, 45 Mich 367, 368; 8 NW 85 (1881).]

Wengel goes on to explain that for a co-tenant to successfully claim adverse possession against another co-tenant, there must be “evidence of acts or declarations that clearly establish” that the co-tenant in possession does not recognize or honor the other co-tenant’s rights in the property. *Id.* at 97. These acts or declarations must also “unambiguously provide notice to the

cotenants of an effort to displace or exclude them from the premises in violation of their property rights such that a cause of action arises.” *Id.* In other words, because one co-tenant’s possession of the co-owned property is not by itself inconsistent with the other co-tenant’s rights, the co-tenant claiming adverse possession must have done or said something to indicate to the other co-tenant that she claimed exclusive ownership of the property. The 15-year period for establishing a claim of adverse possession does not begin to run until a cause of action accrues, and in the context of co-tenancy, that can only happen when the co-tenant in possession clearly intends to claim exclusive ownership and gives the other co-tenant (or co-tenants) notice of that claim.

Here, defendant either holds title to the subject real property for the dissolved partnership, or his interest had previously been converted into tenancy-in-common. In either case, plaintiff’s possession is not hostile to defendant’s rights in the property. Plaintiff and Norman Hill were operating Hill’s Tavern on land deeded to Norman and defendant as partners. The fact that plaintiff and Norman were in exclusive possession does not by itself indicate hostility.

Plaintiff states in her brief on appeal that she and Norman were in exclusive control of the property and paid all property taxes and upkeep expenses. She also states that they collected rent from Hill’s Tavern Inc., and that defendant never attempted to collect rent or share any of the expenses. She argues that these facts give rise to her claim of adverse possession.

Although these facts would be persuasive in the ordinary adverse possession context between a record owner and an intruder, they do not help plaintiff under these circumstances. Under the rule in *Wengel*, to succeed plaintiff must show that more than 15 years ago she or her predecessor in interest made some act or declaration that clearly established that she did not recognize defendant as a co-owner of the property. Absent such an act or declaration, no cause of action ever accrued and the adverse possession “clock” never started running. There is no evidence in the record, nor is it stated in any of the pleadings or arguments, that such a declaration was ever made.

Accordingly, defendant did not lose title to the property through plaintiff’s adverse possession.

Finally, based on our findings as set forth in this opinion, we reject appellee’s assertion that we should award her attorney fees under MCR 7.216(C).

We reverse the grant of summary disposition and remand for resolution of defendant’s counterclaim consistent with this Court’s opinion. We do not retain jurisdiction. No costs are awarded to any party. MCR 7.219(A).

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello